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OFFICE OF THE SECRETARY

Jenner & Block, LLC
601 Thirteenth Street, NW
Suite 1200 South
Washington, DC 20005-3823
Tel 202 639-6000
w.jenner.com

Chicago
Dallas
Washington, DC

Marc A. Goldman
Tel 202 639-6087
Fax 202 661-4849
mgoldman@jenner.com

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: *Written Ex Parte*
Review of the Section 251 Unbundling Obligations of Incumbent Local
Exchange Carriers – CC Dockets No. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

With an avalanche of ex parte filings, the BOCs continue their onslaught against UNE-P. That onslaught is based on rhetoric, not the record. As the D.C. Circuit acknowledged, the touchstone of the unbundling analysis is impairment and not the peripheral claims that make up the BOC ex partes. Based on the evidence in the record, there is no doubt that CLECs would be impaired without access to UNE-P (including unbundled switching) for mass market customers.

I. Market Evidence of Impairment

The best evidence of impairment is the market evidence. It has now been more than six years since the Act was passed. Where CLECs can compete effectively in a particular market without access to an unbundled element, there will be substantial evidence that they are actually doing so. As SBC itself points out, “the Commission must be guided by actual marketplace evidence, which is far more probative than theoretical concerns.” The market shows there is almost no competition for mass market customers by CLECs using their own switches.

Although the BOCs claim that there are 3 million residential customers on facilities, almost none of these are served via UNE-L, as Z-Tel shows in its Reply Comments. And even in the small business market, the evidence shows only very limited successful use of a UNE-L strategy. The BOCs do not dispute this in their recent *UNE Rebuttal Report*, merely repeating their claim about 3 million customers. Even if this claim accurately represented CLECs using a UNE-L strategy – and it does not – it would be a tiny fraction of such customers.

¹ SBC Reply Comments at 67

The BOCs dismiss this evidence of real marketplace behavior by suggesting that the absence of UNE-L competition results from the availability of UNE-P. But there is no evidence whatsoever for this proposition, at least in the mass market. Prior to 2000, there was little UNE-P competition anywhere in the country other than New York. In part, this was because of regulatory battles, restrictions by BOCs on UNE-P, or prohibitive prices for UNE switching. Yet no significant competition for mass market customers using UNE-L developed. *Cf.* New York State Department of Public Service Comments at 4 n. 17 (“Moreover, the fact that the hot-cut process impairs the CLECs’ ability to provide their own switching is reinforced by the failure of the CLECs to install their own switches during the period they were arguing that the unbundled switching rate was too high.”) Even CLECs such as AT&T that did temporarily employ a UNE-L strategy had to retreat from that strategy after it proved unsustainable. And this has not changed. Although there remain parts of the country where switch prices limit UNE-P competition, UNE-L competition in the mass market remains virtually non-existent,

The BOCs point to the existence of significant deployment of CLEC switches in some markets and to the spare capacity that exists on many of those switches. But the fact that CLECs, including WorldCom, have not been willing to use a UNE-L strategy even at central offices where they are already collocated – demonstrates that, at present, CLECs continue to be impaired without access to unbundled switching. CLECs would not leave spare capacity on their switches unused unless there were significant impediments to use of that capacity.

The BOCs point to Cavalier and Broadview to show that UNE-L competition is possible.² But these are the only competitors they cite as using UNE-L for residential customers anywhere in the country. The existence of two competitors employing a UNE-L strategy in limited areas in one region of the country for a small number of customers does not yet provide a basis for concluding that a UNE-L strategy can currently make even these particular markets competitive, much less other markets. Indeed, if the Commission had extrapolated in the past from the existence of one or two competitors relying on a particular strategy, it would have concluded that many market strategies would succeed that in fact did not.

WorldCom believes that in certain limited market segments UNE-L competition may in the future be possible if certain preconditions are met. For now, however, on a national basis it is clear that competitors almost universally are not using their own switches to serve customers in the mass market because there is no viable way for them to do so. That is why almost all of the state commissions advocate the continued availability of UNE-P after careful evaluation of the market evidence in their states. As the Illinois Commission recently put it, “[a]ny modifications or elimination of the UNE platform at this important stage of this evolving process would likely impede competition, lead to additional litigation battles and more bankruptcies, and further damage the currently fragile economic condition of the telecommunications industry.”³

² *UNE Rebuttal Report* at 16.

³ Letter from Illinois Commerce Commission Chairman Kevin Wright to Senator Richard Durbin, Oct. 1, 2002.

II. Sources of Impairment

Given the clear market evidence of impairment, there is no legal basis for denying access to switching. The record evidence also establishes *why* CLECs remain impaired. For now, CLECs are impaired by the economic cost of serving customers via UNE-L and by provisioning issues associated with hot cuts. CLECs may, however, be able to compete using a UNE-L strategy in the future in some parts of the mass market.

There is no need to parse the record to evaluate whether the sources of impairment are real. The market evidence demonstrates that they are. But the non-market evidence of impairment also is definitive. With respect to the economics of a UNE-L strategy, WorldCom has demonstrated that CLEC costs for transport and switching are more than 200% of the ILEC costs in a typical medium sized city even at a 15% market penetration across the entire market.⁴ And this does not even consider the cost of hot cuts. AT&T has put in evidence that when these costs are considered, on average, a CLEC's costs are higher than the average *retail* rates for the service of residential customers until the CLEC has 800 DSOs at a central office. Even if the CLEC has 1300 DSO residential customers in a central office, the CLECs' costs appear to be close to 90% of the retail rate.⁵ And even for small business customers, the backhaul cost disadvantage is significant. A CLEC cannot compete with the ILEC if its costs are 90% of the retail rate before even considering marketing expenses, the cost of personnel to oversee the hot cut process, and other internal expenses. (It is also not clear whether AT&T is including collocation costs). Moreover, in the vast majority of areas in which retail costs are higher than the ILECs' actual costs, the ILEC could reduce its retail charges in the face of competition. Thus, in reality, the CLEC must be able to meet the ILECs' costs (or close to them) in order to compete effectively, not just the current retail costs.⁶

As a result, in much of the mass market, the economics alone are likely to preclude a CLEC from using a UNE-L strategy.⁷ The severe economies of scale in the telecommunications industry, and the BOCs' headstart with near 100% market share, impair CLECs from serving mass market customers via their own switches. The BOCs make no effort to demonstrate

⁴ Reply Decl. of Mark Bryant.

⁵ AT&T Oct. 3 ex parte presentation, *Comparing ILEC and CLEC Local Network Architectures*.

⁶ This is particularly relevant for small business customers where the gap between retail rates and cost is generally greater than in the residential market. If the CLEC attempts to compete using UNE-L in the small business market, the ILEC can simply drop its rates, still make a profit, and drive the CLEC out of the market.

⁷ WorldCom's experience suggests the difficulties of acquiring sufficient scale to compete using a UNE-L strategy in much of the market. WorldCom has managed to acquire 5,000 or more residential lines in only 28 ILEC central offices. WorldCom ex parte letter from Ruth Milkman to Marlene Dortch (Nov. 5, 2002). Even in New York, after nearly four years in the market, WorldCom's market share is roughly 7%. The average number of WorldCom lines in each central office is 840 out of 13,700. WorldCom sells service throughout New York; yet in 45% of the central offices in New York, WorldCom has fewer than 100 lines.

otherwise.⁸ The BOCs have not put *any* evidence in the record on the economics of UNE-L. They again rely on the fact that CLECs have deployed switches. But that is not evidence that CLECs can use those switches to serve mass market customers. While CLECs can minimize the import of economies of scale in switching by using a single switch to serve more than one BOC central office, the longer distances over which they have to transport traffic then impair the CLECs. The cost of collocation, hot cuts, and analog equipment for the collocations also each contribute to high CLEC costs that generally preclude use of a UNE-L strategy in the mass market.⁹ The cost of collocation space in particular is a sunk cost that cannot be recovered if sufficient concentration is not obtained. Moreover, for a UNE-L strategy to be effective in a mass market operation, the CLEC must have sufficient UNE-L customers across the entire market to justify the OSS development and training required to serve some customers on UNE-P and others on UNE-L.”

Nonetheless, in highly concentrated portions of particular markets, it may in the future be possible for CLECs to compete economically using a UNE-L strategy. But the economics will vary based on many factors.” There is no way for the Commission to determine in advance on a national basis where such competition will be possible.

In addition, before UNE-L competition develops in any segment of the mass market, an additional source of impairment will have to be eliminated. Hot cut performance will have to improve significantly. For mass market customers, CLECs have worked since passage of the

⁸ Verizon argues that economies of scale never count as impairment so long as “an entrant can, over time using its own facilities, profitably serve less than the entire market.” Verizon Oct. 16 *ex parte* letter from William Barr to Chairman Powell. That is absurd. Under that standard, a CLEC is not impaired so long as it could profitably serve the market if it obtained 99% of the market. The view advocated by Verizon ignores the fact that the telephone industry is different than other industries because the ILECs are starting from close to a 100% market share.

⁹ See *ex parte* presentation of David Gabel of Queens College, Oct. 17, 2002 (noting that hot cut cost, cost of transport, and cost of analog equipment may impair CLECs from using their own switches to serve customers).

¹⁰ *Cf.* FCC en banc hearing (Oct. 7, 2002) (Tr. at 127-28 (Lara Warner) (describing significant capital needed to care for customers, which requires large scale)).

¹¹ WorldCom showed that the cost differential between CLECs and ILECs would be reduced if the ILEC provided concentrated EELs, thus potentially making a UNE-L strategy possible where it would not otherwise be possible. By using such EELs, CLECs could avoid collocation, leverage the BOCs’ economies of scale in the transport network by purchasing transport from the BOC, and increase these economies through concentration. Thus, although the CLEC would still have to backhaul traffic to its switch, an expense avoided by the BOC, the costs of transport would approach the BOCs’ costs if CLECs had approximately a 15% market share across the entire market in a typical medium sized city. Reply Decl. of Mark Bryant ¶ 53. There may, however, be significant technical issues with concentrated EELs that would need to be worked out before CLECs could use such EELs. In addition, at present, concentrated EELs are generally not available, and the price for non-concentrated EELs is too high to permit CLECs to compete.

Act to obtain an automated ordering process from the BOCs, including automated processing of the orders. This has taken years of litigation at state commissions and at this Commission, and extensive development efforts by CLECs as well as by the BOCs. For UNE-P, this has generally resulted in same-day processing of UNE-P orders, a relatively low trouble rate, and low costs associated with processing of the order. These are similar to the equal access conditions that led to the flourishing of long distance competition.

But for UNE-L, the provisioning process remains heavily manual, the customer inevitably loses dial tone for some period of time, provisioning generally will not occur for many days, and the risk of troubles is significant. In addition, the CLEC must devote significantly more resources to placing and monitoring each order than with UNE-P. The internal effort to oversee thousands of individual hot cuts alone is likely to preclude use of this strategy for mass market customers.¹²

Until the hot cut process is equivalent to the equal access process for long distance, or the UNE-P process, it will be very difficult for CLECs to compete for mass market customers using UNE-L to perform individual hot cuts. AT&T and others have explained that the process could be improved if the BOCs were to adopt electronic loop provisioning. The BOCs have responded with specific criticisms of AT&T's proposal for electronic loop provisioning. The point, however, is not that the BOCs need to adopt some particular version of electronic loop provisioning but rather that they must adopt some method that ensures provisioning equivalent to what has been achieved for UNE-P or for equal access.¹³ Rather than criticizing one such method, the BOCs should propose alternatives. The only alternative they have discussed – Verizon's "Wholesale Provisioning Tracking System" process – is a web based tool that automates some aspects of communication between CLECs and Verizon concerning the status of hot cut orders and troubles with such orders but does not automate – or even alter – the provisioning process.¹⁴

There is also no evidence that the current hot cut process – or Broadview's project based hot cut process – is scalable. WorldCom has shown that in Georgia, New York and Texas, the BOCs process approximately seventy times as many UNE-P orders per month as UNE-L

¹² In addition to interactions with the ILEC concerning the loop order, and interaction with NPAC concerning LNP, the CLEC must perform a number of functions on its side for the customer's cutover to be successful. The CLEC must hire switch technicians to enter the translations needed to provision customer's features, and create 911 listings, LIDB listings, and directory listings. The CLEC must also establish a process to ensure that the CLEC's switch is ready at the same time as the ILEC's switch. All of this makes successful completion of UNE-L orders with LNP much more difficult than UNE-P orders. The CLEC cannot simply request that a customer's directory listing remains the same, for example.

¹³ See, e.g., CompTel/PACE Coalition ex parte letter from H. Russell Frisby & Genevieve Morrelli to Marlene Dortch, Oct. 31, 2002.

¹⁴ Verizon ex parte letter from Ann Berkowitz to Marlene Dortch, Oct. 24, 2002

orders.¹⁵ There is no basis for concluding that the BOCs could process all of the UNE-P orders as UNE-L orders using their manual hot cut processes. The BOCs simply assert that their processes are scalable if they hire additional personnel and move personnel around.¹⁶ But the Commission has never accepted such assertions of readiness and scalability during section 271 proceedings in part because such assertions have so often proved incorrect. The Commission has therefore demanded real evidence of scalability. Such evidence is particularly vital with respect to hot cuts where the process has so many manual steps. Yet there has never been any third party test or commercial evidence of hot cut scalability.¹⁷ And the one state commission to thoroughly examine the hot cut process and comment on it, the New York Commission, explicitly concluded that the hot cut process was not scalable.” Indeed, when Broadview has asked to perform project hot cuts with Verizon, Verizon apparently has often capped the volume of those hot cuts at approximately 125 lines per central office for the entire CLEC community. Verizon has also said that only a limited number of lines projects can be conducted within a specific geographic area. And some central offices have complex physical wiring on frames that limits the number of lines that can be pre-wired for a cut.¹⁹ Such a limited volume of hot cuts per day will not work in a mass market environment even if the CLEC already has acquired the customers via UNE-P.

While alleviating some of a CLECs’ internal issues in attempting to serve mass market customers using UNE-L, a process of project hot cuts adds other complexity. Because Broadview is currently the only CLEC employing this process, it is not yet clear that CLECs will be able to overcome these issues in serving the mass market. Broadview’s process requires the CLEC to place UNE-P orders and then to submit UNE-L orders. This subjects the customer to

¹⁵ WorldCom, *UNE-P: The Key to Local Competition*, Oct. 1,2002

¹⁶ *See, e.g.*, SBC ex parte letter from Brian Benison to Marlene Dortch, Oct. 11, 2002, attaching SBC Hot Cuts presentation. Interestingly, SBC’s claim is limited to “stand alone unbundled loops,” even though CLECs would need loops with LNP. *Id.* at 2. Number portability takes a minimum of three days and also requires coordination between the ILEC and CLEC. It is also important to note that SBC’s presentation does not discuss switch translations as part of the central office process, but WorldCom has sometimes been told by SBC that orders needed to be slightly delayed as a results of limitations in the number of switch translations it could perform. Finally, SBC’s claim of scalability should be met with even more skepticism in light of its recent communications with WorldCom informing it of severe limits in the number of circuits it can groom in its region as a result of resource constraints. A company that can only groom 600 circuits a month in the Ameritech region, for example, can hardly be expected to process hundreds of thousands of hot cut orders in the same region.

¹⁷ See Transcript from October 17,2002 Session In the Matter to Consider Ameritech Michigan’s Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996, Case No. U-12320 at 5500, 5526 (third party tester in Michigan indicating that it had tested less than 200 hot cut orders and had never tested significant volumes of hot cuts in any OSS test).

¹⁸ New York Department of Public Service Comments at 4 & n.18.

¹⁹ Broadview Oct. 16 ex parte letter from Rebecca Sommi to Marlene Dortch, Oct. 16,2002.

risks on both occasions, requires the CLEC to develop OSS for UNE-P and UNE-L, and requires the CLEC to place orders twice. The process is even more complicated for fiber-fed loops served via IDLC. In that case, a method is needed to determine if there are spare copper facilities available. If it is, the CLEC must place an order to transfer the customer to those facilities.” Further, the CLEC must still monitor the hot cuts to determine whether they work. It has taken CLECs several years of internal work and work with the BOCs so that UNE-P provisioning is generally a smooth and effective process. Transitioning to a project hot cut strategy, even in select markets, will also take time. And it is not yet clear that it will work even if BOC performance improves.

The Commission has repeatedly made clear in the section 271 context that the best evidence of operational readiness is commercial experience. But the BOCs have no experience provisioning loops with LNP for commercial volumes of mass market orders and no other evidence of scalability. This is because CLECs have long had problems with provisioning of even today’s small volume of UNE-L orders, because use of the current hot cut process of mass volumes of customers presents a host of obstacles to CLECs, and because of the economic barriers to a UNE-L strategy. Evidence on specific sources of impairment therefore confirms what is apparent from the market evidence alone: for now, the absence of unbundled switching in any part of the mass market would “genuinely impair competition that might otherwise occur.”²¹

III. Impact of Unbundling

Given virtually uncontested evidence that CLECs attempting to serve mass market customers are impaired in the absence of unbundled switching, switching must continue to be unbundled. There is nothing in the Act stating that UNE-P is transitional and must be phased out even if impairment still exists. Indeed, as noted above, the D.C. Circuit acknowledged that impairment is the touchstone of the unbundling analysis.“

The D.C. Circuit also observed that in analyzing unbundling the Commission should consider the “competing values at stake” in the Act.²³ Based on these values as well, the Commission should require unbundling of switching for mass markets customers.

²⁰ Broadview Oct. 16 ex parte, Project Management Process of UNE-Loop Cutover. Transferring the customer to copper also raises significant parity issues. Because the customer would have fiber with the ILEC but copper with the CLEC, the customer will likely have access to DSL with the ILEC but may not with the CLEC as a result of impediments to provision of DSL service over long copper loops.

²¹ *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (2002)

²² *Id.*

²³ *Id.* at 428.

A. UNE-P is of Tremendous Benefit to Consumers.

The record shows that UNE-P has led to simpler rate structures, improved features, and lower rates, as well as protecting competition in downstream markets. Before the advent of UNE-P, in states such as Pennsylvania, customers had a complicated “band” system even for purely local service. Through WorldCom’s Neighborhood product, these customers now have access to the first bundled local/long distance product with calls free of charge to anywhere in the country, as well as an attractive combination of features. Z-Tel is offering customers products with unique features, unavailable from the BOCs.²⁴ Indeed, because CLECs using BOC switches have access to the full functionality of the switch, they can design products with every bit the same creativity as if they were using their own switches. Their success in doing so is apparent. WorldCom now serves over 2.4 million residential customers in 39 states and the District of Columbia.²⁵

UNE-P competition also has prompted the BOCs to provide better products to consumers. The BOC response to CLEC entry via UNE-P has included development of simpler rate structures, provision of additional features, and lower prices.²⁶ In Michigan, for example, Ameritech has dropped its price for its own unlimited local product by more than 50%. And in Pennsylvania, Verizon has eliminated its complex “band” system and has also rolled out a bundled product.

Finally, and equally important, UNE-P protects competition in downstream markets such as the long distance market. In the absence of UNE-P, and thus the absence of a vehicle by which competitors can profitably provide local service to mass market customers, the BOCs will be the only companies able to offer bundled local and long distance products. Market research shows that more than 50% of households in New York have the same provider for local and long distance. Approximately 90% of households ordering new service order a bundled product.²⁷ If the BOC is the only company that can offer such a product, long distance competition will

²⁴ Z-Tel ex parte letter from Christopher Wright to Marlene Dortch, Oct. 9, 2002, Attachment

²⁵ The BOCs argue that CLECs are limiting where they sell based on cost. *UNE Rebuttal Report* at 35. It is certainly true that WorldCom only is selling products that it believes will be profitable. But WorldCom is selling UNE-P far beyond the most densely populated wire centers, sometimes in all of the zones in the state. And where WorldCom is not targeting low end customers, this is because it would not be profitable to do so. This generally has nothing to do with the subsidies the BOCs point to, which, as WorldCom has showed, do not affect many customers. See Reply Decl. of Dan Kelley ¶¶ 61-63. It rather results from the fact that UNE rates have been set significantly above TELRIC in many states and from the fact that CLECs must pay non-recurring charges that the BOCs themselves do not need to pay. In any case, the fact that some customers might not be eligible for or choose to purchase WorldCom’s local offerings is not a basis for depriving the majority of customers of the competition provided through UNE-P.

²⁶ AT&T ex parte letter from Joan Marsh to Marlene Dortch, Oct. 16,2002

²⁷ Reply Decl. of Wayne Huyard ¶ 18.

quickly disappear. That is directly contrary to the purpose of the Act under which section 271 was designed to maintain long distance competition by ensuring that local markets were open when the BOCs were providing long distance service. It would be entirely inconsistent with the Act for the BOCs' to gain long distance entry based on provision of WE - P at TELRIC rates and then be permitted to withdraw WE - P from the market.

There is nothing on the other side of the ledger. The BOCs suggest that there are three disadvantages to continuation of UNE-P: (1) it negatively affects BOC profits; (2) it decreases the incentive of the BOCs to deploy facilities; and (3) it decreases the incentive of CLECs to deploy facilities. The record does not support the BOCs with respect to any of these claims.

B. BOC Claims Of Lost Profits Should Be Rejected

To begin with, the BOC claims of lost profits are simply irrelevant. The Act is designed to protect competition, not particular competitors.²⁸ It is not designed to ensure continued BOC profits if the BOCs' expense structure remains the same.

And in any event, the CLECs have conclusively refuted the investment reports on which BOC claims of lost profits are based, primarily the UBS Warburg analysis. Indeed, in their *UNE Rebuttal Report*, the BOCs do not even respond to WorldCom's analysis of those investment reports, merely characterizing it as "flawed." *UNE Rebuttal Report* at 26. Instead, they simply quote back some of the already-refuted investment reports, including reports that are themselves fundamentally inconsistent with the BOC's conclusion. For example, they quote a Legg Mason Report,²⁹ but more recently Legg Mason concluded that BOCs are capable of protecting their market share and thus their investment by bundling local and long distance products, as Verizon has successfully done.³⁰ The BOCs also quote a Network Conceptions analysis for the proposition that the UBS Warburg report was based on accurate retail and UNE pricing data,³¹ while failing to note that Network Conceptions overall conclusion was that the UBS Warburg report was flawed because "UBS made assumptions on cost that are inaccurate, inappropriate as applied to the TELRIC model and as a consequence misleading in how they are used in the analysis."³² And the BOCs ignore JP Morgan's conclusion that BOC profitability will increase

²⁸ *Local Competition Order* ¶ 705.

²⁹ *UNE Rebuttal Report* at 27.

³⁰ Legg Mason also touted the advantage of UNE-P in allowing deregulation of the retail market and noted that current capital constraints significantly limit the likelihood of facilities-based competition in the residential market through cable or wireless. Legg Mason, *Equity Research Industry Update*, Aug. 22, 2002.

³¹ *UNE Rebuttal Report* at 26.

³² Network Conceptions, *Access to the Network [UNE-P]: Catalyst for Massive Change in Local Telecom?*, Executive Intelligence Briefing, at 21 (Sept. 2002). Network Conceptions further concluded that "[t]he consensus among analysts today is that facilities-based competition is a pipedream for the majority of local service providers," and that UNE-P "if properly managed, will likely become the catalyst that allows all types of telecom companies to compete

as a result of the bundled local/long distance products they can offer after section 271 entry.³³ Moreover, several state commissions that have actually set the rates have determined the BOCs' argument is incorrect.³⁴ As the Kansas Commission recently explained, "[I]n spite of sweeping claims to the media that UNE prices are too low, Southwestern Bell has not petitioned this Commission for a review of its UNE prices. Further, Southwestern Bell, on its own initiative, reduced some UNE rates in connection with the FCC's consideration of its 271 application for Kansas."³⁵ And Verizon has admitted that it has no data to support its claim that its revenue losses are the result of UNE-P.³⁶

Indeed, at the Commission's en banc hearing, only one expert even suggested that UNE-P was harming the BOCs. The others attributed the industry's problems to a variety of other causes.³⁷ Moreover, Robert Konefal of Moody's discussed the continued solid rating of most BOCs as opposed to most CLECs and said that it could not easily be determined whether the increase in BOC profits from long distance entry would outweigh any reduction in profits on the local side.³⁸ And in any case some reduction in profits should be expected as a result of competition. The Act is not meant to guarantee that there will be no financial impact on the BOCs as a result of competition, but simply to provide all competitors a reasonable opportunity to compete.

Moreover, the BOC claim about profitability has nothing to do with whether switching should be unbundled. It is a complaint about UNE rates. It should therefore either be addressed to this Commission in a separate docket arguing for revision of the TELRIC standard or to states in the course of cost proceedings as an argument for reaching a different result. But this Commission has already recognized that TELRIC rates permit BOCs to obtain a reasonable profit,³⁹ and the Supreme Court has agreed.⁴⁰ It is also important to note that if the BOCs truly

equally and fairly in all segments of the mass market, especially the residential segment of the telcom industry," *id.* at 12, including forcing "the RBOCs to deal with the actual competitiveness of their service offerings at all levels." *Id.* at 43.

³³ JP Morgan, *Industries Face Off*, Sept. 16,2002, at 8.

³⁴ Letter from Illinois Commerce Commission Chairman Kevin Wright to Senator Richard Durbin, Oct. 1,2002.

³⁵ Kansas Corporation Commission ex parte letter from Commissioners John Wine, Cynthia Claus, and Brian Moline to Chairman Powell, Oct. 31, 2002.

³⁶ Massachusetts Coalition for Competitive Phone Service ex parte letter from Michelle Consalvo to Chairman Powell, Oct. 28, 2002.

³⁷ See, e.g., FCC en banc hearing (Oct 7, 2002) (Tr. at 73 (Kim Wallace); Tr. at 78-79 (Lara Warner)).

³⁸ FCC en banc hearing (Oct. 7,2002) (Tr. at 124-25).

³⁹ See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶ 699 (1996)..

⁴⁰ See *Verizon Communications, Inc. v. FCC*, 2002 WL 970643, *19 n. 19 (2002).

believed that UNE-L competition were possible, they would never argue for elimination of UNE-P, as they would then lose *all* of the revenue associated with each customer.

C. UNE-P Does Not Decrease BOC Investment

As for the BOCs' second argument, the argument that UNE-P leads to a diminution in BOC investment in facilities, this argument is conclusively refuted by the BOCs' own evidence. The BOC reply report entitled *UNE-P and Investment* concludes that "there is no statistically significant correlation between UNE-P levels and ILEC investment" in the states studied!⁴¹ The BOC rhetoric that UNE-P prices are the cause of recent BOC reductions in capital investment⁴² therefore must be dismissed as just that. Indeed, the record evidence actually shows that UNE-P increases RBOC investment, providing an additional reason for continued unbundling.⁴³

D. UNE-P Does Not Decrease CLEC Investment

Finally, the BOCs' claim that UNE-P discourages CLEC investment in facilities is almost equally devoid of evidentiary support. It is a claim based on an unsound economic theory that has not borne out in reality. The only significant UNE-L and fiber-based competition that has proven viable to date is competition for large business customers in urban areas. This competition is entirely unaffected by the availability of UNE-P for mass market customers.

1. UNE-P Does Not Affect Development of UNE-L.

Even where the availability of UNE-P has been restricted or UNE-P has been priced too high, UNE-L has not developed. This fact definitively refutes claims that it is UNE-P competition that is stopping the development of UNE-L.

CLECs are using UNE-L to serve some medium sized and large business customers (and limited small business customers). But even there the record does not show a tradeoff between UNE-P and UNE-L. Indeed, the record shows just the opposite. Z-Tel and the UNE-P Coalition have both provided studies showing that UNE-P does not decrease UNE-L and may in fact increase it. WorldCom has cited studies by Joseph Gillan showing that UNE-P has not led to a decrease in UNE-L in Texas or Georgia.⁴⁴ And WorldCom also has pointed to the FCC's own data showing that UNEs without switching increased at essentially the same pace nationally in 2001 as in 1999 and 2000 even though UNE-P increased far more dramatically in 2001 than in prior years.⁴⁵

⁴¹ *UNE-P and Investment*, attached to Verizon Reply Comments, at 12.

⁴² *UNE Rebuttal Report* at 27.

⁴³ See Robert Willig, John Bigelow, William Lehr, and Stephen Levinson, *Stimulating Investment and the Telecommunications Act of 1996* (Oct. 11, 2002).

⁴⁴ WorldCom Comments at 88-90.

⁴⁵ WorldCom, *UNE-P: The Key to Local Competition*, Oct. 1, 2002.

The BOCs do not attempt to refute this evidence. Nor do they provide any of their own evidence on a tradeoff between UNE-P and UNE-L. Instead, they assert that the impact of UNE-P must be assessed against end-to-end facilities-based competition, not UNE-L.⁴⁶ But by effectively conceding that UNE-P does not diminish UNE-L competition, the BOCs have also effectively conceded UNE-P has no detrimental effect on use of any CLEC facilities to serve mass market customers. Even the BOCs do not have the temerity to claim that elimination of UNE-P would lead CLECs to construct their own loops to serve mass market customers.

2. UNE-P Does Not Decrease Deployment of Fiber Loops

The BOCs assert that UNE-P diminishes provision of fiber loops for business customers.⁴⁷ They present statistical correlations from year-end 2001 and June 2002 that ostensibly show a tradeoff between UNE-P and facilities-based competition (without controlling for any other variables).⁴⁸ But the BOCs acknowledge that if all states were included in the analysis, the correlation would not produce statistically significant results. Moreover, AT&T has definitively refuted the BOC analysis.⁴⁹ And Z-Tel presents evidence that overall facilities-based entry is actually higher when UNE rates are lower.⁵⁰

Even if the correlations presented by the BOCs were accurate, they would not imply causation. By far the largest portion of CLEC facilities are used to serve large business customers and thus the difference in facilities deployment among states is almost certainly a function of difference in deployment of these facilities for large business customers. But this difference cannot be explained by the degree of UNE-P penetration. CLECs such as WorldCom that use facilities to serve large business customers in urban areas do so regardless of the availability of UNE-P. Certainly, differences in fiber deployment for large business customers cannot be explained by the availability of UNE-P for mass markets customers. As for small business customers, there is no evidence that any CLEC is attempting to deploy fiber to serve these customers even where UNE-P deployment is non-existent. Thus, the differences in CLEC deployment of facilities among states almost certainly has nothing to do with the prevalence of UNE-P even if there appears to be some correlation. Indeed, it is likely that whatever differences in facilities-based growth exist among the states existed before UNE-P began to grow significantly, showing that these differences are not caused by the growth of UNE-P.⁵¹

⁴⁶ *UNE Rebuttal Report* at 33.

⁴⁷ *Id.*

⁴⁸ *UNE-P and Investment* at 3; *UNE Rebuttal Report* at 29.

⁴⁹ AT&T ex parte from Joan Marsh to Marlene Dortch, Oct. 16, 2002 (attaching C. Michael Pfau, *Correcting the RBOCs' Empirical Analyses of the Linkage Between UNE-P and Investment* at 9-10).

⁵⁰ Z-Tel ex parte letter from Christopher Wright to Marlene Dortch, Oct. 10, 2002 (listing empirical papers on UNE Competition).

⁵¹ The BOCs also cite a slew of meaningless statistics to support the proposition that UNE-P decreases CLEC provision of purely facilities-based service. For example, they assert that "FCC data indicate that 67 percent of all lines provided entirely over CLEC facilities were deployed as

3. UNE-P Does Not Decrease Deployment of Cable Telephony

As for the residential market, the BOCs' claim that UNE-P diminishes competition from cable telephony. But that claim also is not supported by the evidence. The BOCs provide no statistical correlations to support their claim. They rely primarily on Figure 2 in their report on *UNE-P and Investment*, which ostensibly shows that states with high facilities-based residential competition (almost all of which is cable competition) have low UNE-P competition. But Figure 2 is not a statistical correlation, the analysis performed by AT&T show there is no statistically significant correlation,⁵² and Figure 2 actually suggests the opposite of what the BOCs say. Of the 15 states with the highest residential facilities-based usage in the Figure, five are among the states with the highest UNE-P competition.

The more recent data provided by the BOCs in their UNE Rebuttal Report add nothing to the BOCs' claim with respect to facilities-based residential competition. The BOCs say that "[t]he 10 states with the highest level of residential UNE-P competition accounted for three-quarters of residential UNE-P growth over the past six months, but only a third of the growth in facilities-based residential lines."⁵³ But this says nothing about whether the growth of facilities-based residential lines in these 10 states was disproportionate to growth occurring in other states with similar characteristics. Nor do the BOCs say that the comparative growth of facilities in the two groups of states changed as UNE-P growth accelerated in the first group of states.

The BOCs further contend that "69 percent of facilities-based residential lines were deployed in states where CLECs are not using UNE-P to any significant extent,"⁵⁴ and that 85% of facilities-based residential lines deployed in the past six months were deployed outside of the five states where AT&T's Michael Armstrong said that regulators had gotten prices right.⁵⁵ The BOCs again do not show that deployment of facilities-based lines in these states was disproportionate to what would be expected in these states given their other characteristics such

of June 2000, compared to only 28 percent of UNE-P lines." *UNE Rebuttal Report* at 5. But this does not even show that growth of CLEC facilities-growth slowed down after June 2000, something that would be expected in any event as capital dried up. It certainly does not show that CLEC facilities-growth slowed more where UNE-P grew significantly. The BOCs similarly assert that "[m]ost of the competitive facilities in states where there is significant UNE-P usage were put in place well before UNE-P took off." *Id.* at 5. But that is simply a function of the fact that the growth of UNE-P is a recent phenomenon, occurring mostly from 2000 onward. It is likely that in all states, a majority of facilities-based deployment occurred prior to 2000, even those states with very limited UNE-P growth. Moreover, in the two states where UNE-P usage began in 1999, New York and Texas, approximately half of facilities growth occurred after UNE-P took off according to the BOCs' own chart. *Id.*

⁵² *Correcting the RBOCs' Empirical Analyses* at 13

⁵³ *UNE Rebuttal Report* at ii.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 6.

as size and density. Nor do they show that whatever differences do exist result from deployment of UNE-P. The relative speed of facilities deployment among the states, whatever it is, may be the same now, as it was before UNE-P deployment accelerated in some states.

Thus, even though one might expect some tradeoff between UNE-P and cable – and in a truly competitive market actually hope that they would compete against each other – there is no evidence that this has materialized. In fact, in a recent speech, Cox Communications President and CEO James Robbins indicated that the recent growth in UNE-P had not led to a decrease in cable competition. “[W]e have not seen it [dampen sales] in any of our markets,” he explained. He added that this was in part because Cox’s bundle of voice, data, and video service likely insulate it from chum caused by UNE-P.⁵⁶ Moreover, the BOCs themselves argue that cable telephony has increased significantly in 2002 at the same time that UNE-P has increased dramatically,⁵⁷ thus substantially undercutting their claim that UNE-P is leading to a diminution in cable growth.

In any event, cable telephony serves such a small fraction of the market (less than three percent) and the prospect of significant expansion in the near future is so bleak that any potential tradeoff between cable and UNE-P must be considered irrelevant. The HAI Report explained the many reasons that it is unlikely there will be a rapid expansion of cable telephony and none of these reasons have anything to do with UNE-P. Many of these were echoed in the recent presentation of Lara Warner at the Commission’s en banc hearing. She explained that there is little capital for facilities-based expansion of any sort, including cable, and that any spare capital available to cable companies will likely be devoted to defending their core video business, while cable companies wait for scalable IP telephony.⁵⁸ The increase in cable telephony in 2002 discussed by the BOCs does not change this analysis. It still leaves cable with less than 3% of the residential and small business market.⁵⁹ That is not a basis for limiting unbundling requirements.

In the end, the assertion that switching should not be unbundled even though CLECs would be impaired without it is based on nothing more than a naked policy judgment that a regime of forced leasing is undesirable. But Congress made a contrary policy judgment, and the FCC is obligated to comply with that judgment. Under the standards set forth by Congress, switching must continue to be unbundled.

It has now been more than six years since passage of the Telecommunications Act. There is far less need to rely on abstract economic models or competing allegations on operational issues to determine whether CLECs are impaired. The market provides clear evidence that

⁵⁶ *TR Daily*, Oct. 22, 2002.

⁵⁷ *UNE Rebuttal Report* at 2.

⁵⁸ FCC en banc hearing, Oct. 7, 2002 (Tr. at 83-85).

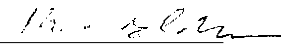
⁵⁹ WorldCom Comments at 35 (showing 1.5 million customers is less than 2 percent of residential and small business lines).

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CLECs are impaired in serving mass market customers in the absence of unbundled switching. The Commission should apply the law and continue requiring the BOCs to provide UNE-P.

Sincerely,


Marc Goldman
Jenner & Block
601 13th St., N.W.
Washington, D.C. 20008
Counsel for WorldCom, Inc.

Cc: William Maher
Michelle Carey
Tom Navin
Rob Tanner
Jeremy Miller
Brent Olson
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Daniel Gonzalez